

**MINUTES  
of the  
SECOND MEETING  
of the  
WATER AND NATURAL RESOURCES COMMITTEE**

**July 14-15, 2008  
Aztec**

The second meeting of the Water and Natural Resources Committee was called to order by Representative Andy Nunez, chair, at 10:10 a.m. on July 14, 2008 in the San Juan County Administration Building in Aztec, New Mexico.

**Present**

Rep. Andy Nunez, Chair  
Rep. Paul C. Bandy  
Rep. Ray Begaye  
Sen. Mary Jane M. Garcia (July 15)  
Rep. Larry A. Larrañaga (July 14)  
Rep. Kathy A. McCoy  
Sen. Steven P. Neville  
Sen. Mary Kay Papen  
Rep. Mimi Stewart  
Rep. Don L. Tripp

**Advisory Members**

Sen. Carlos R. Cisneros  
Rep. Anna M. Crook  
Rep. Nora Espinosa  
Rep. Candy Spence Ezzell  
Sen. Cisco McSorley

**Absent**

Sen. Phil A. Griego, Vice Chair  
Rep. Elias Barela  
Sen. Sue Wilson Beffort  
Rep. Joseph Cervantes  
Sen. Dede Feldman  
Sen. Clinton D. Harden, Jr.  
Rep. Dona G. Irwin  
Sen. Cynthia Nava

Sen. Rod Adair  
Sen. Vernon D. Asbill  
Sen. Timothy Z. Jennings  
Sen. Gay G. Kernan  
Rep. Ben Lujan  
Rep. James Roger Madalena  
Rep. Danice Picraux  
Sen. Leonard Lee Rawson  
Sen. Nancy Rodriguez  
Sen. John C. Ryan  
Rep. Henry Kiki Saavedra  
Rep. James R.J. Strickler  
Rep. Peter Wirth  
Rep. Eric A. Youngberg

(Attendance dates are noted for those members not present for the entire meeting.)

**Guests**

The guest list is in the original meeting file.

**Staff**

Gordon Meeks  
Jon Boller  
Jeret Fleetwood

**Monday, July 14**

Representative Nunez began by having members of the committee and staff introduce themselves.

**Welcome to San Juan County**

Representatives of the San Juan County Commission welcomed committee members to Aztec and thanked them for coming.

**Indian Water Rights Settlement Agreements Status**

Jim Dunlap, chair of the Interstate Stream Commission (ISC), provided the committee with a brief overview of the Navajo Nation Water Rights Settlement. He explained that, while there is some disagreement over the settlement, it benefits both Native American and non-Native American water users in the Four Corners area in several ways. Mr. Dunlap pointed out that the settlement provides water to non-Native Americans without the threat of expensive court battles, which allows for continued economic development and growth throughout the region.

Estevan Lopez, director of the ISC, also provided the committee with testimony regarding the settlement. He explained that one of the steps toward completion of the settlement is passage of a bill through Congress. Mr. Lopez indicated that the Northern New Mexico Rural Water Projects Act was introduced by Senators Bingaman and Domenici and Congressman Udall on April 19, 2007. He noted that the act approves the settlement and authorizes construction of several of the projects laid out in the settlement, particularly the Navajo-Gallup Water Supply Project. Mr. Lopez went on to explain that the Senate version of the bill had been combined with 90 other bills as part of the Omnibus Public Land Management Act, which is ready for consideration by the full senate.

Mr. Lopez went on to provide the committee with some idea about the sequence of events that would occur once the bill becomes law and discussed the funding for the various projects. He noted that the settlement is currently estimated to cost \$900 million, with most of the money going toward construction of the Navajo-Gallup Water Supply Project.

John Leeper of Navajo Nation Water Resources also discussed the settlement. He began by emphasizing that the Navajo Nation strongly supports the settlement and its centerpiece, funding for the Navajo-Gallup Water Supply Project. Mr. Leeper illustrated the importance of the settlement by noting that many of the 80,000 inhabitants of the Navajo Nation currently have to haul water, most of whom would be served by the project. Mr. Leeper echoed Mr. Dunlap's

comments that the settlement would also greatly benefit non-Native American water users, explaining that if the settlement were to fall through, the Navajo Nation would be forced to determine its water rights through litigation, likely a much more expensive prospect for all involved.

Gil Arviso, a Navajo Nation water rights commissioner, underscored the importance of the settlement by also pointing out that a likely consequence of the settlement failing would be expensive litigation.

John D'Antonio, state engineer, provided the committee with a breakdown of some of the year-by-year costs of the settlement. He explained that while the federal government would provide the funding for most of the projects associated with the settlement, state and local governments would also contribute.

D.L. Sanders, chief counsel for the Office of the State Engineer (OSE), addressed some of the concerns expressed by parties who had not signed on to the settlement. He explained that the OSE has gone from a stance of not negotiating on Indian water rights claims to trying to build consensus and developing settlements that would maintain all existing water uses and provide water for tribal permanent homelands. Mr. Sanders also pointed out that the federal government would provide the funding for the portion of the settlement that funds Native American water projects since the state does not contribute to projects that do not also benefit non-Native Americans.

Questions and comments included:

- that San Juan/Chama project water allocations remain intact under the terms of the settlement;
- the division of water among New Mexico, the Navajo Nation and Arizona;
- whether the bill authorizing the projects is still subject to amendment or other modification;
- funding for the project, along with funds for the *Aamodt* and Taos settlements, is contained in the senate bill;
- whether a plan exists to address those families that will still have to haul water once construction of the Navajo-Gallup Water Supply Project is finished;
- where funding for the state and local contributions to the project will come from; and
- that over 250,000 will ultimately be served by the various projects contained in the settlement.

### **Concerns of Non-Signers to the Agreements**

Dick Rochester of the Pojoaque Basin Water Alliance provided the committee with a list of the objections raised by individuals who have chosen not to sign on to Native American water rights settlements, particularly the *Aamodt* settlement. He explained that the principal objections of most non-signers include:

- costs to taxpayers;
- a lack of justification of the water system the settlement proposes;

- the possibility of water rights holder impairment by Native American water rights holders;
- potential effects of the settlements on acequia associations and other agricultural users; and
- cost-sharing arrangements of the settlements.

Former Senator Raymond Kysar also discussed the concerns of non-signers regarding Native American water rights settlements. He began by emphasizing the importance of water to all of New Mexico's inhabitants. Senator Kysar went on to suggest that no senior water rights holders in northwestern New Mexico were consulted about the terms of the Navajo Nation Water Rights Settlement. He then indicated that a better approach to administering water rights in the region would be for the OSE to hire someone to determine the amount of water available in San Juan County and adjudicate it. He also noted that New Mexico needs to implement and adequately fund water courts to expedite the adjudication process.

Jimmy Rogers, secretary/treasurer of the San Juan County Agricultural Water Users Association, echoed Senator Kysar's comments, particularly regarding the consultation with and protection for senior water rights holders in the region once the settlement is finished.

Questions and comments included:

- whether the Navajo Nation owns all of the water stored in Navajo Reservoir;
- notice of adjudication to water users on the San Juan River;
- whether a hydrographic survey has been conducted on the San Juan River and the surrounding area; and
- that the Navajo Nation Water Rights Settlement cannot be completed if the bill is signed into law and funding for the projects contained in it is not provided.

The state engineer responded to the concerns raised by non-signers by pointing out that:

- New Mexico does, in fact, have water courts;
- while adjudication of the San Juan River is underway, many water users in the area have not actually been served with court papers concerning the adjudication, and therefore have not been contacted yet;
- that many of the concerns raised by the non-signers are actually issues regarding water rights administration in New Mexico in general and not necessarily points of the Navajo Nation Water Rights Settlement;
- that the settlement is a negotiation, the nature of which often means that not everyone gets exactly what they want;
- that most water users in the area covered by the settlement are likely to fare better under the terms of the settlement than they would in a protracted court battle with the Navajo Nation, which has indicated that it would pursue that avenue if the settlement fails; and
- the hydrographic survey of the San Juan River has been conducted, mostly by the Bureau of Reclamation, and is a public document viewable by whomever wishes.

## **Water Quality and Oil and Gas Drilling**

Mark Fesmire of the Oil Conservation Division (OCD) provided the committee with testimony regarding the promulgation of OCD rules regarding oil and gas wells, particularly the so-called "pit-rule". He explained that the rule was developed in response to several documented cases of ground water near oil and gas wells being contaminated. Mr. Fesmire also indicated that tests showed that leakage in the liners installed around wells could be the cause of contamination and pointed out that contaminants could be classified as hazardous waste. Mr. Fesmire went on to note that the rule governed the material construction and thickness of liners placed around wells to prevent such contamination. He acknowledged that while the new rules have not been well-received by the oil and gas industry because they increase the costs of drilling new wells, the increased costs of prevention are exponentially cheaper than the cost of remediation if a well site becomes contaminated. Mr. Fesmire finished by suggesting that the statutes governing oil and gas wells need to be updated.

Adan Trujillo, an attorney in Rio Arriba County, provided the committee with testimony regarding an oil company's activities in Rio Arriba County. He began by emphasizing that Rio Arriba County is not opposed to oil and gas development. However, he indicated that as an oil company submitted applications to begin drilling in the Rio Chama watershed, the county realized that both its regulations and those of the OCD might not be strong enough to protect the watershed.

Mr. Trujillo went on to discuss the specific points of the oil company's application in the Rio Chama watershed. He provided the committee with photographs showing that the proposed drilling site is in close proximity to the headwaters of Tierra Amarilla Creek, and while possibly allowable by OCD regulations, would almost certainly contaminate the headwaters of the creek and underlying ground water. Mr. Trujillo suggested that this indicates a lack of adequate siting by criteria and indicated that the OCD regulations governing the criteria need to be examined and probably strengthened. For example, he noted that requiring hydrographic surveys of proposed sites could have easily prevented the current situation, which has Rio Arriba County protesting the permit that would allow drilling at the site.

Tom Mullins, engineering manager for Synergy Operating, LLC, provided the committee with testimony regarding the work oil and gas companies generally do to ensure that water resources are adequately protected. He explained that oil and gas companies contemplate all kinds of risk, and emphasized that regulatory risk is perhaps the greatest threat to continued oil and gas resource development. He went on to note that regulatory and bureaucratic hurdles to oil and gas development are a large source of uncertainty in the industry. Mr. Mullins concluded by stating that the enactment of the pit rule by the OCD was simply unnecessary because of the work oil and gas companies already do to ensure the safety and quality of water resources when exploring and drilling.

Rudy Garcia, legislative liaison for Santa Fe County, echoed Mr. Trujillo's comments, indicating that Santa Fe County is experiencing similar issues with proposed oil and gas wells, and he hopes to develop regulations addressing those issues in the near future.

Representative Bandy, who emphasized that he was appearing before the committee as a landowner and rancher, explained that ranching in San Juan County is difficult and that oil and gas development provides financial opportunities to landowners in the area. He added that he has several oil and gas wells on his property, and that he has had to file two lawsuits with oil and gas companies regarding repair of damage done to his land by wells. Representative Bandy concluded by noting that oil and gas exploration in the region is a fact of life and that some balance between the industry and landowners will have to be worked out in the future.

Steve Henke, area manager for the Bureau of Land Management (BLM), provided the committee with some background information on the oil and gas industry in northwestern New Mexico and the role of the BLM in the struggle between landowners and the industry. He noted that oil and gas companies contact the BLM to set up an on-site meeting between the bureau, the landowner or grazing leaser and the company seeking a permit. Mr. Henke emphasized that the goal of the BLM in the process is to minimize the impact of wells on the land. Some of the tools he noted that the BLM employs in that regard include requirements for low-impact roads, recommendation of interim and final land reclamation improvements and final well plugging and abandonment procedures.

Questions and comments included:

- caveat emptor for landowners;
- the fate of marginal oil and gas wells if OCD rules are fully implemented;
- various levels of contamination in wells;
- that the size of drilling pads will have to increase under new requirements;
- disposal of well "cuttings";
- oil and gas exploration in Santa Fe County;
- the difficulty in reversing the existing pit rule if another administration so desired;
- consideration by Rio Arriba County of a moratorium on oil and gas drilling similar to Santa Fe County's; and
- what oil and gas companies are required to do in the event of a spill or some other form of contamination.

### **Tour of Oil and Gas Drilling Sites**

Representative Bandy led the committee on a tour of several oil and gas drilling sites located on and near his property. Representatives of the oil and gas industry highlighted various aspects of the wells and surrounding terrain, such as the various strategies employed for environmental and wildlife protection, land remediation, noise management and safety. They pointed out that while the basic requirements are the same, different companies employ different methods to varying degrees of success.

### **Tuesday, July 15**

#### **House Memorial 42 Task Force Status Report**

John Longworth and John Romero, both of the OSE, provided the committee with an

update regarding the task force convened in response to House Memorial 42, passed in 2007, which asked the OSE to set up a stakeholder group to address potential changes to Section 72-1-9 NMSA 1978, the statute requiring 40-year water plans for some entities. Mr. Longworth explained that the memorial contemplated three basic types of changes to the statute: adding to the list of entities allowed to hold unused water for 40 years, extending the time period from 40 years to 100 and establishing criteria for the OSE to review water development plans.

Mr. Longworth and Mr. Romero indicated that the OSE had put together a broad-based group of stakeholders, composed of about 50 organizations and individuals, to attend meetings to review issues raised by the memorial. Mr. Longworth indicated that the stakeholder group also solicited written comments from any other interested parties. Then, he explained, a template was developed for the analysis of the water plans, which the stakeholder group is reviewing.

Mr. Longworth and Mr. Romero explained that while the stakeholder group has also discussed the issues of adding entities to the statute and extending the period, the group has not been able to achieve consensus on either issue. Still, he pointed out that most stakeholders seem to feel that the process is valuable and has resulted in better understanding of the fundamental policy questions raised by the memorial. Mr. Longworth went on to note that the future of the task force involves development of a draft status report for the task force to review. He concluded by emphasizing that while the work of the task force has not yet been completed, the memorial and subsequent task force meetings have resulted in a positive exploration of public policy by water stakeholders in New Mexico.

Questions and comments included:

- discussion of the ability of some entities to hold 150 percent of their allotted water;
- specific entities that are covered by the statute and which ones might be added;
- whether state universities are covered by the statute;
- how the statute currently affects the transfer of water rights;
- the ability of municipalities to transfer and possibly hoard water rights for longer than the 40 years currently required;
- potential difficulties arising from increasing the time period to 100 years, particularly with respect to trying to predict growth patterns in the state;
- how increasing the time period for water plans might curtail the ability of the state engineer to administer water rights;
- whether out-of-basin water rights transfers are subject to approval by affected conservancy districts;
- issues related to the fact that all of the stakeholder meetings have been held in Santa Fe;
- the effect that increasing the time period to 100 years might have on major water projects, such as the Ute Pipeline Project, that are already planned; and
- the necessity of being careful about transferring water out of basins or planning projects such as pipelines that accomplish the same thing.

## **Dam Safety**

Mr. D'Antonio and Mr. Romero provided the committee with testimony regarding dam safety in New Mexico. Mr. Romero began by indicating that New Mexico has a significant number of dams that have been deemed to be in either unsatisfactory or poor condition, and that continued inattention will only cause the existing problem to get worse. He went on to explain that some of the dams in poor or unsatisfactory condition are considered "high hazard", which means that loss of life will occur if those dams fail. Mr. Romero then provided the committee with a county-by-county breakdown of high-hazard dams, pointing out those communities that have a particularly high number of high-hazard dams.

Mr. Romero then explained that the OSE has begun using capital outlay money to begin repairing dams, but noted that relatively little funding has been dedicated to the problem. He went on to note that one of the hurdles the OSE is facing is the difficulty the OSE has had in recruiting and retaining qualified dam engineers. He pointed out that dam engineering is a rather specialized field, and that engineers qualified to do it usually opt to seek employment with higher-paying private engineering firms. Mr. Romero also noted that the OSE does not actually own any of the dams; it only coordinates with the owners for maintenance and repairs.

Mr. Romero also discussed the statute that governs OSE oversight of dams in New Mexico, explaining that modifying the statute might also help address the problem. He explained that many of the dams the OSE must evaluate are actually stock tanks for livestock, but their height and capacity are sufficient to require that the OSE check on them. Mr. Romero pointed out that most livestock water tanks pose little risk to persons or property and provided the committee with proposed legislation that would exempt most of those dams from having to submit plans to the OSE.

Dave Velasquez, Aztec city manager, identified four area dams that may have safety issues. He explained that one of them is in Bloomfield, two are reservoirs near Aztec and the fourth one is a planned reservoir near Aztec. Mr. Velasquez indicated that safety problems had been identified with the dam for the planned reservoir, so the plans were redone and the location was changed. He noted that Aztec is currently moving forward with plans for the reservoir, which would hold 90 acre-feet of water once completed.

Questions and comments included:

- cost increases in dam and water project construction associated with delays in getting the projects started;
- problems with the OSE dam regulations and Aztec's planned reservoir;
- ownership statistics for dam ownership;
- financing help for dams from the New Mexico Finance Authority;
- problems the OSE has experienced attracting and retaining qualified dam safety engineers;
- potential outsourcing of OSE dam engineer work;
- performance bond requirements by the OSE for dam engineering work;
- the unlikely possibility that small livestock dams on BLM lands are included on the OSE's dam safety list; and



- potential changes to dam safety language and exemptions to that language.

#### **House Memorial 40, EPA Clean Water Standards Effect on New Mexico**

Ron Curry, secretary of the New Mexico Department of Environment (NMED), and Karen Gallegos, director of the NMED's Water and Wastewater Infrastructure Development Division, provided the committee with testimony regarding House Memorial 40, which addresses the clean water standards mandated by the Environmental Protection Agency (EPA). Ms. Gallegos explained that Governor Richardson has issued an executive order addressing clean water standards by creating a department to manage water and wastewater development, particularly with regard to the financial planning required to plan, construct and manage water and wastewater systems. She went on to explain that the Water and Wastewater Infrastructure Development Division will work closely with the drinking water and construction divisions of the NMED. Ms. Gallegos also highlighted the development of the uniform funding application, which should allow communities desiring to upgrade their water or wastewater systems in order to stay in compliance with federal regulations to apply for funding once and have their application submitted to dozens of state and federal agencies that help provide funding for those kinds of projects.

Secretary Curry then discussed House Memorial 40, which he explained addresses clean water standards. He explained that there are some basins in New Mexico, such as the Tularosa Basin, that could be unprotected, particularly since there are some streams on the eastern side of the state that do not run on an annual basis and therefore do not meet federal requirements.

Secretary Curry also discussed issues related to a wastewater treatment plant planned for the Ruidoso area that the EPA has raised concerns about. He pointed out that although \$30-40 million in costs had already been incurred, the possibility of the facility not being approved is a realistic possibility.

Questions and comments included:

- contaminant levels present in the water that have caused permit approval problems for the Ruidoso facility;
- costs and time frame for remediation of contaminated ground water depends heavily on the level of the contamination and the nature of the contaminant;
- who generally bears the cost of ground water remediation;
- whether the NMED has jurisdiction over Native American water;
- that the Attorney General's Office can only help NMED in criminal matters;
- remediation status of potash mine tailings;
- cleanup of abandoned uranium mines;
- federal contribution to the planned Ruidoso facility; and
- NMED jurisdiction over contamination that crosses state lines.

There being no further business, the committee adjourned at 12:00 noon.



Senator Papen, chair of the Water Adjudications Subcommittee, called the subcommittee to order at 8:35 a.m. with Representatives Ezzell, Bandy, Nunez and McCoy present.

Mr. Meeks summarized the quarterly report of the OSE and Administrative Office of the Courts (AOC) task force on adjudication reform, which had been presented to the Legislative Finance Committee. The task force has traveled to Colorado, Montana and Idaho to interview court and water management agency officials on the effectiveness of their adjudication procedures. The task force also sent a survey to New Mexico water rights stakeholders, but to date, the response rate on the survey has been disappointing.

Bill Hume, the governor's special assistant on water, commented that the resignation of two members of the task force does not reflect the substance of the task force discussions as much as it reflects the role of the court personnel who resigned. The members were concerned that there may be a perception of impropriety if the task force recommends reform in a way that could be perceived as prejudging a particular water rights adjudication. The members' employment by the courts requires that they be scrupulous in maintaining independence and objectivity.

Mr. Sanders told the subcommittee that he had been skeptical at first of the effort to reform the adjudication process but that after the visits and research being conducted on other states' procedures, he has seen some avenues for improvement and the effort is paying off in developing worthwhile information for improving the process whether or not the task force recommends statutory change. He reported that politics still plays a role in the other states, describing Idaho and Montana's claims-based adjudications. He said that even though those two states have established deadlines for claimants to file their claims with penalties for non-filing, the deadlines are predictably delayed when claimants lobby the legislature for relief. He said that Arizona is not a good example to follow because it is not progressing any better than New Mexico on its adjudications because there is no motivation to complete its adjudications. He said that Colorado has a promising approach in that it does impose a deadline for claimants to file their claims, but the penalty is not loss of water rights but rather to put late-filing claimants into a second tier of priority relative to where their seniority date would have been had they met the deadline for filing. He also discussed the concept of licensing water rights, which is a current provision in state law that has not been used extensively. He said that licensing may minimize the role of the court and the adversarial nature of the process. He told the committee that his office is working on minor changes to the licensing statutes that he anticipates will be brought to the legislature next session. He concluded by saying, he is surprised at how much he has learned during this process of assessing how other states adjudicate water rights.

Questions and comments from the subcommittee addressed:

- the degree of completion of the Pecos River adjudication;
- the expected outcome of the OSE/AOC task force review;
- the low response rate to the OSE/AOC survey;
- clarification of what licensing means;
- the expectation that licensing will provide a reliable, marketable quantification of a water right;
- sufficiency of money appropriated for the OSE/AOC task force;
- how the bottleneck for adjudication is state engineer resources (personnel staffing);

- a potential single water court;
- a four-person expansion of the OSE staff for the middle Rio Grande adjudication to phase in a licensing program;
- encouraging the OSE to have a specific legislative request ready for the November meeting;
- the McCarren amendment for federal reserved water rights;
- pueblo intentions to initiate water rights affirmation;
- the Pecos River as a bad model for the rest of the state;
- the effect of the Elephant Butte Irrigation District's settlement with El Paso District Number 1;
- potential standards for quantifying pueblo water rights;
- the status of existing domestic wells in lieu of the Robinson Court decision; and
- the responsibilities of four additional staff that the state engineer is requesting in his budget.